

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DILLARD TURNEY)	
Claimant)	
)	
VS.)	
)	
GROTHER FARMS, INC.)	
Respondent)	Docket No. 1,019,548
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	
Insurance Carrier)	

ORDER

Claimant requested review of the July 14, 2008 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on October 22, 2008.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. David J. Bideau, of Chanute, Kansas, appeared for the Kansas Workers Compensation Fund (Fund). Dennis Grotheer appeared on his own behalf and purportedly on behalf of respondent Grotheer Farms, Inc.

RECORD AND STIPULATIONS

The Board has considered the record and stipulations listed in the Award.

ISSUES

Although the ALJ made factual findings and conclusions with respect to the claimant's average weekly wage, entitlement to total disability benefits and his functional impairment ratings, he ultimately concluded that benefits could not be awarded against respondent because respondent was not timely notified of the proceedings and did not have a reasonable opportunity to be heard and present evidence. The ALJ also concluded that the Fund had no responsibility in this matter because the evidence failed to establish its liability under K.S.A. 44-532(a).

The claimant appealed this Award alleging a number of errors. Most notably among them is the contention that the ALJ's decision to deny claimant an Award based on lack of statutory notice of the regular hearing, under K.S.A. 44-534, was made *sua sponte* and was apparently in direct contravention to statements made, albeit off the record, before the regular hearing was completed. In essence, claimant's counsel contends the ALJ verbally concluded in an exchange with both parties' counsel¹ that sufficient notice of the regular hearing had been provided to Dennis Grotheer, respondent's representative. From there, the parties proceeded to have the regular hearing. At no time during the hearing did either party raise the issue of lack of timely notice of the regular hearing. Inexplicably, after the case was submitted, the ALJ's Award reflected a finding that the claimant failed to give timely notice of the hearing to the respondent, depriving the respondent of "a reasonable opportunity to be heard and present evidence". Then, instead of ordering a new hearing with proper notice to all parties, he concluded the lack of sufficient notice precluded any finding of liability in this matter.

The Fund maintains the ALJ's Award should be affirmed in all respects.

Dennis Grotheer, who had previously testified at the preliminary hearing that he was the owner of respondent, appeared (via telephone) for oral arguments before the Board and when asked, he informed the parties and the Board that he had no notice of any hearing. And in fact, other than one "packet" of information from claimant's counsel, he had received no written communication from any one, including the Division and the Board with respect to this matter. He confirmed, however, that 1047 South 260th Street, Pittsburg, Kansas 66762 was the correct business address for the respondent's corporation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.² The Kansas Supreme Court has recognized in numerous cases that the right to cross-examine witnesses testifying at administrative hearings of a quasi-judicial character is an important requirement of due process.³

In *Adams*⁴, the Kansas Supreme Court stated:

¹ Counsel for claimant and the Fund were present at the Regular Hearing.

² *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 473 P.2d 72 (1970).

³ *Wulfkuhle v. Kansas Dept. of Revenue*, 234 Kan. 241, 671 P.2d 547 (1983).

⁴ *Adams v. Marshall*, 212 Kan. 595, 601-602, 512 P.2d 365 (1973).

In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:

'An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . .'

The requirements of an administrative hearing of a judicial or quasi-judicial character are phrased in this language in 2 Am. Jur.2d, Administrative Law, § 412, p. 222:

'. . . A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial, and if such a hearing has been denied, the administrative action is void. . . .'

With Mr. Grotheer's statement that he had no notice of the regular hearing, coupled with the documents contained within the Court's file and claimant's counsel's representations as to the content of the off-the-record conversation (which were not controverted by the Fund's attorney), it appears that the decision to proceed with the regular hearing in this matter violated the respondent's rights for due process. Moreover, it appears that the ALJ's decision to proceed with the Regular Hearing based upon a preliminary finding that proper notice had been provided to respondent and the ALJ's ultimate conclusion that claimant failed to establish timely notice of the regular hearing violated claimant's due process rights. Neither claimant nor the Fund had an opportunity to address this issue as it was not identified as an issue in dispute during the course of the regular hearing. For this reason, and in the interests of justice⁵, this matter is remanded to the ALJ for a regular hearing, to be held with sufficient and proper notice to all parties. Respondent, through its legal representative is directed to communicate with counsel for the claimant and the Fund.⁶ Finally, both the ALJ and the parties are specifically directed

⁵*Neal v. Hy-Vee, Inc.*, 277 Kan. 1, P.3d 425 (2003)

⁶ It does not appear that Mr. Grotheer is an attorney. At one point respondent was represented by counsel but that attorney has since been allowed to withdraw. If not a lawyer, then the Board questions whether Mr. Grotheer can appear in a workers compensation matter for the corporation under Kansas law. See *Babe Houser Motor Co. v. Tetreault*, 270 Kan. 502, 14 P.3d 1149 (2000). The Board recommended to Mr. Grotheer that he obtain counsel in this matter.

to provide a copy of all pleadings in this matter to all interested parties as the case proceeds.⁷

ORDER

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 14, 2008, is set aside for a lack of due process and this matter is remanded to the ALJ for further proceedings.

IT IS SO ORDERED.

Dated this _____ day of November 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
David J. Bideau, Attorney for the Fund
Grotheer Farms, Inc., Respondent
Kenneth J. Hursh, Administrative Law Judge

⁷ When preparing for oral arguments the Board noted a number of instances where the parties or the ALJ failed to provide one or more of the litigants with a copy of a pleading. For example: 1) Respondent was not provided with notice of Dr. Prostic's deposition; 2) the certificate of service on the Award does not note it was mailed to respondent; 3) the Fund's terminal dates were extended without any notice to respondent; 4) early on in the case respondent's counsel was allowed to withdraw without benefit of any hearing or apparently any notice to claimant; and 5) the Fund's submission letter was not served upon respondent.